IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-562

ROSEBUD SIOUX TRIBE,
Petitioner,

v.

HONORABLE RICHARD KNEIP, *et al.*,
Respondents.

BRIEF AMICI CURIAE OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION, SOUTH DAKOTA, AND THE CHEYENNE RIVER SIOUX TRIBE OF THE CHEYENNE RIVER RESERVATION, SOUTH DAKOTA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases, continued:

Cases, continued: Page

Statutes:

Statutes, continued: Page

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Pursuant to Rule 42(2), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, the Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota, and the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota, file the attached brief *amici curiae* in support of petitioner in the above-captioned case. The petitioner Rosebud Sioux Tribe and the respondents, the Honorable Richard Kneip, et al., have consented to the filing of this brief *amici curiae*.

INTEREST OF *AMICI CURIAE*

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court,* 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), *Puyallup Tribe v. Dept. of Game,* 391 U.S. 392 (1968), and *Warren Trading Post Co. v. Arizona State Tax Comm'n,* 380 U.S. 685 (1965).

The Oglala Sioux Tribe and the Cheyenne River Sioux Tribe are federally recognized Indian tribes which, respectively, govern their members on the Pine Ridge Reservation and the Cheyenne River Reservation. Pursuant to the provisions of so-called surplus lands acts which were enacted in the early twentieth century, portions of both Reservations were opened to settlement by non-Indians. *See* Act of May 27, 1910, ch. 257, 36 Stat. 440 (Pine Ridge Reservation); Act of May 29, 1908, ch. 218, 35 Stat. 460 (Cheyenne River Reservation). Without exception the areas opened to such settlement have been recognized as Indian country by Congress and have been consistently administered as reservation lands by the Department of the Interior.

This case presents a question of great and continuing concern to the Association, to the Oglala Sioux Tribe, and to the Cheyenne River Sioux Tribe—whether the "surplus lands" statutes which were unilaterally enacted by Congress at the turn of the twentieth century without the consent of the affected Indian tribes, and which opened all or parts of the tribes' reservations to settlement by non-Indians, effected a termination of reservation status. In the present case the Association, the Oglala Sioux Tribe, and the Cheyenne River Sioux Tribe are concerned with this broad issue in a specific context—namely, whether the Acts of April 23, 1904,[1] March 2, 1907,[2] and May 30, 1910,[3] which were enacted without the consent of Rosebud Sioux Tribe, and in which Congress explicitly declared that the United States was not purchasing the lands opened to settlement, effected a termination of the reservation status of three-fourths of the Rosebud Reservation.

If the Court of Appeals' decision in this case is upheld, the ultimate effect of the holding on the Oglala Sioux Tribe[4] and the Cheyenne River Sioux Tribe, as well as numerous other Indian tribes and their members whose reservations are affected by surplus lands statutes,[5] will

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[1]Act of April 23, 1904, ch. 1484, 33 Stat. 254.

[2]Act of March 2, 1907, ch. 2536, 34 Stat. 1230.

[3]Act of May 30, 1910, ch. 260, 36 Stat. 448.

[4]The interest of *amicus curiae* Oglala Sioux Tribe in the present litigation is immediate. In reliance upon its decision in this case, the court below has held that the Act of May 27, 1910, which opened the Bennett County portion of the Pine Ridge Reservation to settlement, also effected a termination of reservation status. *See* United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975). A petition for a writ of certiorari in the *Cook* case is now pending before the Court. *See* Cook v. Parkinson, No. 75-5867 (petition for writ of certiorari, filed December 8, 1975).

[5]At the present time fifteen Indian reservations, excluding the Rosebud, Pine Ridge, and Cheyenne River Reservations, are

[Footnote continued]

be nothing short of a political and cultural revolution. The exclusive jurisdiction of the federal government over Indians who reside on reservation areas which have been opened by Congress to settlement by non-Indians will be terminated. Furthermore, the authority of Indian tribes to exercise traditional powers of self-government over a significant part of their membership will be severely curtailed or entirely eliminated, and, indeed, for jurisdictional purposes, Indians residing on reservation lands opened to settlement will be left to the mercy of the States, which on a previous occasion this Court quite aptly has characterized as "their deadliest enemies." *United States v. Kagama,* 118 U.S. 375, 384 (1886). Finally, a determination that surplus lands acts terminated the reservation status of Indian lands will mean an end for many tribes to substantial federal benefits which legally can be utilized only in reservation areas.

The *amici curiae* recognize that the key legal inquiry is whether the 1904, 1907, and 1910 Acts, in light of relevant legislative materials and principles relating to surplus lands legislation which have been established by this Court in a number of cases, terminated the reser-

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affected by surplus lands legislation. *See* Act of February 14,1913, ch. 54, 37 Stat. 675; Act of June 1, 1910, ch. 264, 36 Stat. 455; Act of May 30, 1910, ch. 260, 36 Stat. 448; Act of May 30, 1908, ch. 237, 35 Stat. 558; Act of May 29, 1908, ch. 218, 35 Stat. 460; Act of May 29, 1908, ch. 217, 35 Stat. 458; Act of March 1, 1907, ch. 2285, 34 Stat. 1035; Act of June 21, 1906, ch. 3504, 34 Stat. 334; Act of April 21, 1906, ch. 1645, 34 Stat. 124; Act of March 22, 1906, ch. 1126, 34 Stat. 80; Act of March 3, 1905, ch. 1452, 35 Stat. 458; Act of December 21, 1904, ch. 22, 33 Stat. 595; Act of April 28, 1904, ch. 1820, 33 Stat. 567; Act of April 27, 1904, ch. 1624, 33 Stat. 352; Act of April 27, 1904, ch. 1620, 33 Stat. 319; Act of April 23, 1904, ch. 1495, 33 Stat. 302; Act of February 30, 1904, ch. 161, 33 Stat. 46.

vation status of Gregory, Tripp, and Mellette Counties. The petitioner and the United States as *amicus curiae,* however, have submitted briefs supporting in detail the position that the aforementioned Acts did not reduce the boundaries of the Rosebud Reservation—a position in which *amici curiae* fully concur.

In order to avoid needless repetition, and to facilitate the consideration of materials which otherwise might not be brought to the Court's attention, the Association on American Indian Affairs, the Oglala Sioux Tribe, and the Cheyenne River Sioux Tribe have chosen to address issues which are not likely to be covered in briefs submitted by the Rosebud Sioux Tribe and the United States. Specifically, the attached brief is offered to assist the Court in recognizing that: (1) the subsequent legislative and administrative treatment of the areas of the Rosebud Reservation opened to settlement by the 1904, 1907, and 1910 Acts confirms the conclusion that the statutes were not intended to effect the disestablishment of reservation lands; and (2) a contrary determination not only departs from subsequent administrative and legislative treatment, but also would have undeniably deleterious social and economic effects on the Rosebud Sioux Tribe and its members.

STATEMENT OF THE CASE

Petitioner, the Rosebud Sioux Tribe, is a constituent part of the Sioux Nation, which, as early as 1851, was recognized by the United States as the owner of a vast domain in what are now the States of North Dakota, South Dakota, Nebraska, Montana, and Wyoming. *See Sioux Nation v. United States,* 500 F.2d 458, 460 (Ct. Cl. 1974). Pursuant to the provisions of a treaty entered into on April 29, 1868, the United States "set apart for the absolute and undisturbed use and occupation" of the

Sioux Nation the Great Sioux Reservation, which embraced approximately 28 million acres of land west of the Missouri River in the Territory of Dakota. Treaty of April 29, 1868, 15 Stat. 635, 636. Article II of the 1868 Treaty expressly guaranteed that no persons except authorized officials of the federal government would be "permitted to pass over, settle upon or reside" on the Reservation. Treaty of April 29, 1868, 15 Stat. at 636. Finally, the 1868 Treaty provided in Article XII that a sale of any part of the Reservation would not be "of any validity" absent the written consent of three-fourths of the male adults of the Sioux Nation. Treaty of April 29, 1868, 15 Stat. at 639.

During the next forty years the United States repeatedly demonstrated a singular inability to abide by the promises made to the Sioux Nation in 1868. Within a decade after the 1868 Treaty became effective, non-Indians initiated a persistent and ultimately effective campaign to convince the federal government to reduce further the Sioux Nation's territory. In capitulation to such pressures, the United States in 1877 acquired unilaterally and without the Sioux Nation's consent approximately 7.5 million acres of the Black Hills portion of the Reservation, which contained substantial gold deposits. *See* Act of February 28, 1877, ch. 72, 19 Stat. 254; *Sioux Tribe v. United States,* 97 Ct. Cl. 613, 655-56 (1942).

In 1889 Congress enacted legislation which effected yet another reduction in the Sioux Nation's reservation. Pursuant to the Act of March 2, 1889, the provisions of which had been assented to by three-fourths of the male adults of the Sioux Nation, the United States restored half of the Great Sioux Reservation to the public domain, and divided the balance into six separate reservations. *See*

Act of March 2, 1889, ch. 405, §§1-6, 21, 25 Stat. 888, 889-90, 897-98. Section 2 of the 1889 Act established a permanent reservation for the Rosebud Sioux Tribe which included all or parts of what later became the counties of Todd, Mellette, Tripp, and Gregory in the State of South Dakota. *See* Act of March 2, 1889, ch. 405, §2, 25 Stat. at 888. Section 19 extended to the reservation thus created all provisions of the 1868 Treaty not in conflict with the 1889 Act, including the promise of absolute and undisturbed use and occupancy, the assurance that all outsiders except for authorized federal employees would be barred, and the requirement that no reservation land would be sold without the written consent of three-fourths of the male adults. *See* Act of March 2, 1889, ch. 405, §19, 25 Stat. at 896.

During the first decade of the twentieth century, Congress enacted unilaterally and without the consent of the Rosebud Sioux Tribe three so-called "surplus" land statutes which opened large parts of the Rosebud Reservation to settlement by non-Indians. See Act of May 30, 1910, ch. 260, 36 Stat. 448; Act of March 2, 1907, ch. 2536, 34 Stat. 1230; Act of April 23, 1904, ch. 1484, 33 Stat. 254. These enactments were labeled "surplus land statutes" because they disposed of land which supposedly was not needed immediately for allotment to individual Indians, and which therefore was deemed by the federal government to be "surplus" to the Tribe's needs. Pursuant to the provisions of all three statutes, parts of the Rosebud Reservation were made available to non-Indian settlers for sale, and the proceeds from such sales were credited to the Tribe as they were received by the federal government. *See* Act of May 30, 1910, ch. 260, §7, 36 Stat. at 451; Act of March 2, 1907, ch. 2536, §5, 34 Stat. at 1231; Act of April 23, 1904, ch. 1484, 33 Stat. at 256.

The history of the three surplus land statutes affecting the Rosebud Reservation actually commences in 1901 when the federal government dispatched a representative to the Rosebud Sioux Tribe to negotiate an agreement for the cession and sale of approximately 416,000 acres in the Gregory County portion of the reservation established by the 1889 Act. Subsequent negotiations resulted in an agreement pursuant to which petitioner did "... cede, surrender, grant, and convey to the United States all [its] claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota...." Agreement of September 14, 1901, 33 Stat. 254. In consideration of the Rosebud Sioux Tribe's cession of lands, the United States agreed to pay petitioner the sum of $1,040,000. *See* Agreement of September 14, 1901, 33 Stat. 254. Three-fourths of the male adults of the Tribe consented to the agreement. Agreement of September 14, 1901, 33 Stat. at 255.

Article VI of the 1901 Agreement required that it be ratified by Congress, and in 1902, therefore, bills were introduced in the Senate and the House of Representatives to effect ratification. The Senate bill, which, in addition to ratifying the Agreement, provided for free homesteads and the donation of school sections to the State of South Dakota, passed only after it had been objected to vigorously on the ground that public funds should not be used to purchase Indian land which in turn was to be given to homesteaders free of charge. *See generally* S. REPT. NO. 662, 57th Cong., 1st Sess. 1-2 (1902). The House of Representatives ultimately rejected both of the provisions added to the 1901 Agreement by the Senate. *See generally* H. REPT. No. 2099, 57th Cong., 1st Sess. 1 (1902).

In response to opposition to the 1902 bills, legislation was proposed in 1903 which adopted the "surplus land" format, and provided that petitioner's reservation in Gregory County would be opened for settlement and sale with proceeds from such sales to be credited to the Tribe. *See* S. 7390, 57th Cong., 2d Sess. (1903). Although the preambles of the bills set forth the 1901 Agreement approved by petitioner, the "modified Agreement" which followed the enacting clause contained significant substantive changes that transformed the transaction from an outright sale of land for a sum certain into an arrangement pursuant to which the uncertain future proceeds from the sale of land would be expended for the benefit of the Rosebud Sioux Tribe as they were received by the United States. *See generally* S. REPT. No. 3271, 57th Cong., 2d Sess. (1903); H. REPT. No. 3839, 57th Cong., 2d Sess. (1903). Both bills, however, did require that the consent of the Rosebud Sioux Tribe to the new statutory approach be obtained. The Senate passed the proposed legislation, but the House declined to act on it. 36 CONG. REC. 2748 (1903).

In the summer of 1903 the federal government sent a representative to the Rosebud Indian Reservation "... for the purpose of negotiating a new agreement ... along the lines proposed in Senate Bill No. 7390...." Letter of June 30, 1903, from the Commissioner of Indian Affairs to James McLaughlin, at 1-2. Despite the considerable efforts of the United States' representative to obtain the Rosebud Sioux' acquiescence in such an approach, less than three-fourths of the Tribe approved the surplus land format.

The federal government's failure to obtain the requisite consent for the agreement in no way dampened Congress' determination to enact a surplus lands statute opening up

the Rosebud Reservation in Gregory County to non-Indian settlement. In January and February, 1904, a committee in the House of Representatives reported out a new bill which employed the surplus lands approach, but conspicuously omitted any requirement of consent by petitioner.[6] *See* S. REPT. NO. 651, 58th Cong., 2d Sess. (1904). The proposed legislation became law on April 23, 1904.

In December, 1906, new bills were introduced for the purpose of opening to non-Indian settlement that part of the Rosebud Sioux Tribe's reservation which is located in Tripp County, South Dakota. Congress forewent action on the proposed legislation while a representative of the federal government again was dispatched to the Rosebud Reservation to obtain the Tribe's consent. 41 CONG. REC. 3182 (1907). Despite the repeated efforts of the representative to obtain signatures approving the agreement, less than three-fourths of the male adults in fact agreed to Congress' offering. *See* H. REPT. NO. 7613, 59th Cong., 2d Sess. 7 (1907).

Although the United States and petitioner plainly had reached no understanding which complied with applicable consent requirements, the Secretary of the Interior nevertheless recommended legislation to ratify the "agreement". Letter of February 14, 1907, from E.A. Hitchcock, Secretary of the Interior, to Chairman of the House Committee on Indian Affairs, at 4. Congress, however, ignored the executive branch's advice, and

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[6]Congress' hand had been strengthened considerably in early 1903 by this Court's decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). There the Court upheld the Constitutional validity of a federal statute which ratified an outright sale of Indian land for a sum certain—despite the fact the requisite three-fourths consent required by an earlier treaty had not been obtained.

promptly enacted a unilateral surplus lands statute on March 2, 1907, to ". . . authorize the sale and disposition of [that] portion of the surplus or unallotted lands in the Rosebud Indian Reservation [located in Tripp County, South Dakota]". Act of March 2, 1907, ch. 2536, § 1, 34 Stat. 1230.

In 1908 yet a third surplus lands bill was introduced in the Senate to authorize the sale of the Rosebud Sioux Tribe's lands located in Mellette County, South Dakota. *See* S. 7379, 60th Cong., 2d Sess. (1908). The Secretary of the Interior, while not requesting that the consent of the Tribe be obtained, nevertheless recommended to Congress that it solicit ". . . the views of the Indians . . . before the bill is finally acted on. . . ." S. REPT. NO. 887, 60th Cong., 2d Sess. 3 (1909). The Senate Committee on Indian Affairs at first explicitly rejected the Secretary's suggestion because ". . . it would delay the consideration of the matter unduly. . . ." S. REPT. NO. 887, 60th Cong., 2d Sess. 2 (1909). After the Senate failed to act on the proposed legislation, however, a representative of the federal government was instructed to visit the Rosebud Reservation not to obtain the consent of tribal members, but to ". . . take up with the Indians of the . . . Rosebud [Reservation] the matter of opening parts of [the reservation] to settlement. . . ." Proceedings of Councils held by Inspector McLaughlin with Indians of the Rosebud Indian Reservation, at 2 (April 21, 1909). Despite the repeated threats of the United States' representative that Congress would open Mellette County regardless of the Tribe's views, members of the Rosebud Sioux Tribe steadfastly refused to be intimidated, and continued to oppose further sales of their lands. On May 30, 1910, Congress responded by enacting legislation which authorized the ". . . sale and

disposition of a portion of the surplus and unallotted lands in Mellette [County] . . . in the Rosebud Indian Reservation. . . ." Act of May 30, 1910, ch. 260, §1, 36 Stat. 448.

Pursuant to the provisions of 28 U.S.C. §2201, petitioner brought an action in the United States District Court for the District of South Dakota seeking a declaratory judgment that the 1904, 1907, and 1910 surplus lands acts discussed above did not disestablish any part of the Rosebud Reservation as defined by the Act of March 2, 1889. In a judgment entered on February 15, 1974, the District Court decreed that the statutes ". . . did extinguish the reservation or 'Indian land' nature of the unallotted surplus lands in [Gregory, Tripp, and Mellette Counties] by returning them to the public domain, and did diminish the geographical location of the boundaries of the Rosebud Sioux Reservation to conicide with the boundaries of Todd County, South Dakota." *Rosebud Sioux Tribe v. Kneip*, No. Civ. 72-3030 (D.C. S.D. 1974) (judgment entered on February 15, 1974). In an opinion handed down on July 16, 1975, the United States Court of Appeals for the Eighth Circuit upheld the decision of the District Court. *See Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87 (8th Cir. 1975). On October 11, 1975, the Rosebud Sioux Tribe petitioned this Court for a writ of certiorari to review the Eighth Circuit's decision, and on May 24, 1976, the Tribe's petition was granted. *See Rosebud Sioux Tribe v. Kneip*, No. 75-562.

SUMMARY OF ARGUMENT

A review of the administrative and legislative treatment accorded Gregory, Tripp, and Mellette Counties following enactment of the 1904, 1907, and 1910 Acts demonstrates that neither the Congress nor the Secretary

of the Interior believed the surplus lands legislation to have effected the disestablishment of affected portions of the Rosebud Reservation. A determination that the statutes did terminate the reservation status of parts of the Reservation not only would depart from established administrative and legislative precedent, but also would have a debilitating effect on the cultural and economic life of the Rosebud Sioux Tribe and its members. Specifically, such a decision would facilitate the further extension of state jurisdiction over members of the Tribe at the expense of federal and tribal authority, and, moreover, would disrupt the Tribe's economy by precipitating a cessation of substantial amounts of federal monies which can be distributed only to Indian reservation areas.

ARGUMENT

I.

THE SUBSEQUENT ADMINISTRATIVE AND LEGISLATIVE TREATMENT OF THE AREAS OF THE ROSEBUD RESERVATION OPENED TO SETTLEMENT BY THE 1904, 1907, AND 1910 ACTS CONFIRMS THE CONCLUSION THAT THE LEGISLATION DID NOT EFFECT THE DISESTABLISHMENT OF RESERVATION LANDS IN GREGORY, TRIPP, AND MELLETTE COUNTIES, SOUTH DAKOTA.

In a number of decisions, the Supreme Court has turned to the subsequent administrative and legislative treatment of lands opened to non-Indian settlement by surplus lands acts to determine whether a disestablishment of reservation lands occurred. *See, e.g., Seymour v. Superintendent*, 368 U.S. 351, 356-57 (1962). Indeed, in considering the legal import of such a statute in *Mattz v. Arnett*, 412 U.S. 481 (1973), the Court indicated explicitly that ". . . subsequent legislation . . . is not

always without significance." *Id.* at 505 n. 25. An analysis of the subsequent administrative and legislative treatment of the areas of the Rosebud Reservation opened to settlement by the 1904, 1907, and 1910 Acts confirms the conclusion that such legislation did not terminate the reservation status of affected lands.

A. The subsequent administrative treatment of the areas of the Rosebud Reservation opened to settlement by the 1904, 1907, and 1910 Acts supports the proposition that the legislation did not effect the disestablishment of reservation lands.

On several occasions the Secretary of the Interior has indicated explicitly that he does not consider surplus lands legislation to have terminated the reservation status of Indian lands. In an opinion dated August 10, 1934, the Solicitor of the Department of the Interior, in interpreting the provision in the Indian Reorganization Act[7] which authorized the restoration of unsold surplus lands to Indian tribes, offered the following analysis of the effect of statutes such as the 1904, 1907, and 1910 Acts:

> This [historical summary] brings us up to the period of about 1890, at which time there was adopted the plan of opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians. *Under this plan the Indians were to be credited with the proceeds only as the lands were sold, the United States not to be bound to purchase any portion of the lands so*

[7]Act of June 18, 1934, ch. 576, 48 Stat. 984; 25 U.S.C.A. §§461 *et seq.* (1963).

> *opened. Undisposed of lands of this class remain the property of the Indians until disposed of as provided by law (Ash Sheep Company v. United States, 252 U.S. 159).* Such lands are usually referred to as surplus lands of Indian reservations opened to public entry. . . . [Emphasis added.]

54 I.D. 559, 560 (1934).

The foregoing construction of surplus lands statutes clearly supports the conclusion that they did not reduce the boundaries of affected Indian reservations. As the Solicitor's 1934 opinion explains, land opened to non-Indian settlement did not pass from Indian ownership to the public domain at the time surplus lands legislation was enacted by Congress, but, instead, remained the property of Indian tribes until it in fact was sold to purchasers. As this Court has indicated explicitly, in commenting favorably on the 1934 opinion, the Solicitor's construction of the surplus lands acts belies the proposition that such legislation effected the disestablishment of reservation lands. *See Seymour v. Superintendent,* 368 U.S. at 357 n. 14. *Accord,* Solicitor's Opinion M-36802 (unpublished, dated March 13, 1970) (analysis of the effect of the Act of June 1, 1910, opening the Fort Berthold Reservation to settlement).

Furthermore, the reasoning of the Solicitor's 1934 opinion has been applied specifically by the Department of the Interior to the 1904, 1907, and 1910 Acts affecting the Rosebud Reservation. After discussing the three Acts and their legislative history in detail, the Office of the Solicitor of the Department concluded as follows in an opinion rendered in 1972:

> . . . [T]he three Acts of Congress cited above '. . . did no more than open the way for non-Indian settlers to own land on the [Rosebud] reservation in

a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards. . . .' as the court stated in *Seymour v. Superintendent.* Clearly revealing the intent of Congress, the title to the 1907 and 1910 Acts declared the purpose to be 'To authorize the sale and disposition of a portion of the surplus and unallotted lands. . .', and the provisions thereof set forth the necessary details at the same time reserving rights to the Indians to which they are entitled by treaty or agreement.

Accordingly . . . pursuant to applicable legal principles, the legal boundaries of the Rosebud Indian Reservation have not been diminished or altered by Congress since the establishment of the original boundaries thereof by the Act of March 2, 1889. . . . [Emphasis added.]

Memorandum Opinion of April 6, 1972, from Wallace G. Dunker, Field Solicitor, to Wyman D. Babby, Area Director, Aberdeen Area Office.

This Court frequently has affirmed the established legal principle that the determinations of the Secretary of the Interior with respect to federal statutes affecting Indians and Indian tribes are entitled to special deference. In *United States v. Holliday,* 70 U.S. (Wall.) 407 (1866), the Court upheld a decision of the Secretary of the Interior concerning an Indian matter on the ground that ". . . it is [our] rule to follow the action of the executive and other political departments of the government whose more special duty it is to determine such affairs." *Id.* at 419. Furthermore, the principle articulated in the *Holliday* case was confirmed recently in *Udall v. Tallman,* 380 U.S. 1 (1965): "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency

charged with its administration." *Id.* at 16. Finally, no reasonable doubt can exist that, in the specific context of determining the legal effect of surplus lands statutes on reservation boundaries, the Secretary of the Interior's treatment of areas opened to settlement by such legislation has been utilized to decide whether disestablishment of reservation lands occurred. *See, e.g., Mattz v. Arnett,* 412 U.S. at 505; *Seymour v. Superintendent,* 368 U.S. at 357. Thus, the Secretary of the Interior's 1934 determination that surplus lands statutes did not reduce Indian reservation boundaries, and his more recent opinion that the 1904, 1907, and 1910 Acts did not effect the disestablishment of any part of the Rosebud Reservation, should be assigned great weight. *See generally Train v. Natural Resources Defense Council,* 421 U.S. 60, 75-87 (1975).

B. The subsequent legislative treatment of the areas of the Rosebud Reservation opened to settlement by the 1904, 1907, and 1910 Acts supports the proposition that the statutes did not effect the disestablishment of reservation lands.

On repeated occasions Congress has acted in a manner which supports the proposition that it did not intend to reduce the boundaries of the Rosebud Reservation by enacting the 1904, 1907, and 1910 Acts.[8] The Act of

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[8]On occasion Congress has referred to areas opened to settlement as being part of the "former" Rosebud Reservation. *See, e.g.,* Act of March 3, 1919, ch. 110, 40 Stat. 1320; Act of January 11, 1915, ch. 8, 38 Stat. 792. At most, however, such legislation creates an ambiguity with respect to the effect of the surplus lands legislation, and, under settled principles of Indian law, the ambiguity should be resolved in favor of the Rosebud Sioux Tribe. *Cf.* Carpenter v. Shaw, 280 U.S. 363 (1930); Choate

December 11, 1963, Pub. L. No. 88-196, 77 Stat. 349, for example, contains a number of provisions supportive of this conclusion. The 1963 Act, which is entitled "An Act to authorize the sale and exchange of isolated tracts of tribal land on the Rosebud Sioux Indian Reservation, South Dakota", provides the following in section 1:

> Notwithstanding any other provision of law, upon request of the Rosebud Sioux Tribe, South Dakota, acting through its governing body, the Secretary of the Interior is authorized to exchange or to sell, by public or negotiated sale, the tribal interests in isolated tracts of land located in Tripp, Gregory, and Lyman Counties, South Dakota, and held by the United States in trust for the tribe; *Provided* . . . . (3) *that any proceeds from the sale of land under this Act are used exclusively for the purchase of land on the reservation within land consolidation areas approved by the Secretary of the Interior*. . . . [Emphasis added.]

Act of December 11, 1963, Pub. L. No. 88-196, §1, 77 Stat. 349. Section 2 of the 1963 Act provides that "[u]pon request of the Rosebud Sioux Tribe . . . acting through its governing body, the Secretary of the Interior is authorized to mortgage tribal interests in isolated tracts of land, in lieu of selling or exchanging them, and *the proceeds of the loan secured by the mortgage must be used exclusively for the acquisition of land on the reservation within land consolidation areas approved by the Secretary of the Interior*. . . ." [Emphasis added.]

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v. Trapp, 224 U.S. 665 (1912). Moreover, use of the words "former" and "formerly" in statutes making reference to areas opened to settlement by surplus lands acts has not prevented courts from holding that disestablishment did not occur. *See* Seymour v. Superintendent, 368 U.S. at 356 n. 12; United States ex rel. Condon v. Erickson, 478 F.2d 684, 688 (8th Cir. 1973).

Act of December 11, 1963, Pub. L. No. 88-196, §2, 77 Stat. 349.

The aforementioned provisions in the 1963 legislation cannot be reconciled with the position that Congress disestablished portions of the Rosebud Reservation under the 1904, 1907, and 1910 Acts. First, the 1963 Act is entitled "An Act to authorize the sale and exchange of isolated tracts of tribal land *on the Rosebud Indian Reservation*", and the legislation indicates explicitly that some of the "isolated tracts of tribal land" are located in Gregory and Tripp Counties, which were opened to settlement, respectively, by the 1904 and 1907 Acts. The obvious inference to be drawn is that in 1963 Congress considered Gregory and Tripp Counties to be a part of the Rosebud Reservation, or, to state the matter another way, that the surplus lands acts in no way had altered the reservation status of those portions of the Reservation located in Gregory and Tripp Counties.

Moreover, the third proviso in section 1 and similar language in section 2 offer additional evidence for the conclusion that Congress did not believe the 1904, 1907, and 1910 Acts had effected the disestablishment of affected reservation lands. The third proviso in section 1 requires that proceeds from the sale of isolated tracts may be used only ". . . for the purchase of land *on the reservation* within land consolidation areas approved by the Secretary of the Interior. . . ." (Emphasis added.) Act of December 11, 1963, Pub. L. No. 88-196, §1, 77 Stat. 349. Section 2 contains an analogous provision which limits the use of proceeds derived from the mortgage of isolated tracts to the ". . . acquisition of land *on the reservation* within land consolidation areas approved by the Secretary of the Interior. . . ." (Emphasis added.) Act of December 11, 1963, Pub. L. No. 88-196, §1, 77 Stat. 349.

The land consolidation districts referred to in the 1963 Act are located, *inter alia,* in Mellette County, which was opened to settlement by the 1910 surplus lands legislation. Since the proceeds from the sale or mortgage of isolated tracts, according to sections 1 and 2 of the 1963 Act, can be utilized only for the purchase of "land *on the reservation* within land consolidation areas", the most reasonable conclusion is that Congress believed Mellette County to be located within the boundaries of the Rosebud Reservation.

The Act of August 20, 1964, Pub. L. No. 88-463, 78 Stat. 560, supports the same conclusion. The 1964 Act, which is entitled "An Act to place in trust status certain lands on the Rosebud Sioux Reservation in South Dakota", contains the following provisions:

> . . . That all the right, title, and interest in and to the following described tracts of land and the improvements thereon *on the Rosebud Sioux Reservation in South Dakota,* shall hereafter be held by the United States in trust for the benefit of the Rosebud Sioux Tribe of South Dakota. . . . [Emphasis added.]

Act of August 20, 1964, Pub. L. No. 88-463, §2, 78 Stat. at 561. Among the tracts included in the list which follows the foregoing provision is "Sec. 28, SWl/4SWl/4" of "T. 42 N., R. 33 W., 6th P.M.", which is located in Mellette County. Since the 1964 Act transferred to trust status tracts of land "on the Rosebud Sioux Reservation", the logical inference is that Congress, by including land located in Mellette County, considered that area to be a part of the Rosebud Reservation. Thus, both the 1963 and 1964 Acts, which afford the opportunity to see how Congress subsequently viewed the 1904, 1907, and 1910 statutes, provide substantial support for the position that surplus lands legislation disestablished no part of the Rosebud Reservation.

II.

A DETERMINATION THAT THE 1904, 1907, AND 1910 ACTS DISESTABLISHED PARTS OF THE ROSEBUD RESERVATION WOULD REPRESENT NOT ONLY A SIGNIFICANT DEPARTURE FROM THE ADMINISTRATIVE AND LEGISLATIVE TREATMENT WHICH ALWAYS HAS BEEN ACCORDED SUCH LANDS, BUT ALSO WOULD HAVE SUBSTANTIAL AND UNDENIABLY DELETERIOUS EFFECTS ON THE ROSEBUD SIOUX TRIBE AND ITS MEMBERS.

As the discussion above demonstrates, a determination that the 1904, 1907, and 1910 Acts terminated the reservation status of areas on the Rosebud Reservation would represent a wholesale departure from the administrative and legislative treatment which, since enactment of the surplus lands statutes, has been accorded such lands by the United States. In addition, however, a decision that areas affected by the 1904, 1907, and 1910 Acts are no longer a part of the Rosebud Reservation would have an unquestionably devastating effect on the life and economy of the Rosebud Sioux Tribe and its members.

A. A determination that the 1904, 1907, and 1910 Acts disestablished part of the Rosebud Reservation would severely disrupt the political and cultural life of the Rosebud Sioux Tribe, because such a decision would result in the further extension of state jurisdiction over the Tribe and many of its members at the expense of tribal and federal authority.

As a matter of established law, the federal government rather than the states has exercised exclusive jurisdiction over Indian tribes and their members. As this Court emphasized in *United States v. Kagama:*

> These Indian Tribes are the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen. [Original emphasis.]

118 U.S. at 383-84. *Accord,* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 89-91 (1942 ed.); *see generally Brader v. James,* 246 U.S. 88 (1918); *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903); *Cherokee Nation v. Hitchcock,* 187 U.S. 294 (1902). If the boundaries of the Rosebud Reservation were reduced by the 1904, 1907, and 1910 Acts, the ultimate result will be a further extension of state jurisdiction over the Rosebud Sioux

Tribe and its members, and, conversely, a diminution of federal and tribal authority over the Rosebud Sioux. *See United States ex rel. Cook v. Parkinson,* 525 F.2d 120 (8th Cir. 1975); *Rosebud Sioux Tribe v. Kneip,* 521 F.2d 87 (8th Cir. 1975).

The effects of such a substantial alteration of the historical patterns of federal, state, and tribal jurisdiction on the Rosebud Sioux Tribe and its members will be nothing short of a political and cultural revolution. Even if the result of a determination that the 1904, 1907, and 1910 Acts reduced the boundaries of the Rosebud Reservation is only that state jurisdiction will be extended over Indians residing on non-trust lands in Gregory, Tripp, and Mellette Counties, the consequences may be highly significant. From an historical standpoint, the federal government consistently has recognized the unique status of Indian tribes as polities which possess many of the characteristics of a sovereign nation, and which traditionally have exercised extensive powers of self-government over their lands and members. *See generally Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831). By contrast, state jurisdiction is inherently assimilative because it does not differentiate between Indians and non-Indians in the application of laws which unquestionably are important in shaping a society. State laws relating to such diverse subjects as land use, domestic relations, and probate, for example, if applied indiscriminately to non-Indian and Indian alike, would have an irreparably debilitating effect on Indian culture.

Moreover, in all probability, the establishment of state jurisdiction over Indians in non-trust areas would have a spillover effect into trust areas held by the Rosebud

Sioux Tribe and its members.[9] In Gregory, Tripp, and Mellette Counties, trust property is widely dispersed among non-trust tracts, and the chances of maintaining a separate culture on trust lands surrounded by areas over which the state exercises jurisdiction would be most difficult, if not impossible.[10]

More critically, however, the proposition is hardly assured that state jurisdiction in the disestablished parts of the Rosebud Reservation would be limited to non-trust lands. Some state laws, of course, probably would be held inapplicable to trust property under any circumstances. Their trust status, for example, would prevent the application of state tax laws to tribal lands and individual allotments in Gregory, Tripp, and Mellette Counties. *See The Kansas Indians,* 72 U.S. (5 Wall.) 667 (1866); *The New York Indians,* 72 U.S. (5 Wall.) 708 (1866). Furthermore, from the standpoint of federal

[9]In Gregory, Tripp, and Mellette Counties, the Rosebud Sioux population numbers almost 2,000. Furthermore, the amount of trust property held by the Rosebud Sioux Tribe in the three counties approaches 140,000 acres, and individual members of the Tribe own allotted lands which total some 230,000 acres.

[10]Moreover, as this Court emphasized in the Seymour case, such a "checkerboard" approach to jurisdiction makes a rational scheme of criminal law enforcement virtually impossible:

> . . . [L]aw enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by [18 U.S.C.] §1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.

368 U.S. at 358. *Accord,* Moe v. Confederated Salish and Kootenai Tribes, ___U.S.___, 44 U.S.L.W. 4535, 4540 (April 27, 1976).

criminal jurisdiction, trust property located in the disestablished portion of the Rosebud Reservation, in all likelihood, would remain "Indian country" within the meaning of the federal criminal code. *See* 18 U.S.C.A. §§1151-53 (1966); *Donnelly v. United States,* 228 U.S. 243 (1913); *United States v. Celestine,* 215 U.S. 278 (1909); *Ex parte Wilson,* 140 U.S. 575 (1891); *but see Tooisgah v. United States,* 186 F.2d 93 (10th Cir. 1950).

Other state laws which pose a serious threat to the continued viability of tribal culture, such as those relating to land use planning, and hunting and fishing activities, might well be applicable to disestablished parts of the Rosebud Reservation. Although no legal authority appears to have addressed the foregoing issue directly, it is highly significant that, in exempting Indian tribes and individuals from state jurisdiction, this Court has placed considerable stress on the fact that the legally significant event occurred within the boundaries of an Indian reservation. Thus, in *Williams v. Lee,* 358 U.S. 217 (1958), which involved the issue whether the courts of the State of Arizona had the power to entertain a legal action against a member of the Navajo Tribe, the Court explained that "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians *on a reservation.*" [Emphasis added.] *Id.* at 220. *See generally Kennerly v. District Court,* 400 U.S. 293 (1971). The same emphasis appears again in *McClanahan v. State Tax Comm'n,* 411 U.S. 164 (1973), when the Court, in rejecting the State of Arizona's attempt to collect a tax on income earned by a member of the Navajo Tribe on the Navajo Reservation, noted that ". . . appellant's rights as a *reservation Indian* were violated when the state collected a tax from her which it had no jurisdiction to impose." [Emphasis added.] *Id.* at 181.

Conversely, this Court intimated in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), that state authority over Indian property lying outside the boundaries of a reservation might be far more extensive. In holding that gross receipts taxes which the State of New Mexico had imposed on a resort owned by plaintiff on off-reservation land were legal, the following reasoning was offered:

> . . . [T]ribal activities conducted outside the reservation present different considerations. 'State authority over Indians is yet more extensive over activities . . . *not on any reservation.*' Organized Village of Kake, supra, at 75, 7 L.Ed.2d 573. *Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.* [Citations omitted.] [Emphasis added.]

Id. at 148-49. Thus, the significant risk exists that, should the 1904, 1907, and 1910 Acts be held to have disestablished parts of the Rosebud Reservation, state jurisdiction over both non-trust and trust property in Gregory, Tripp, and Mellette Counties would be expanded significantly.

An expansion of state jurisdiction, not unexpectedly, would be accompanied by a diminution of federal and tribal control over tribal members on both trust and non-trust lands. In *United States v. Mazurie*, 419 U.S. 544 (1975), for example, the rule clearly has been established that federal and tribal regulation of liquor sales extends to all reservation lands.[11] *See generally* 18 U.S.C.A. §1154 (1966). If Gregory, Tripp, and Mellette Counties are considered to be outside the boundaries of

[11]The only exception is lands located in "non-Indian communities". *See* 18 U.S.C.A. §1154 (1966).

the Rosebud Reservation, however, only trust property—at most—still would be subject to the federal and tribal regulation of liquor sales. 18 U.S.C.A. §1154 (1966).

Furthermore, an Indian tribe's extraterritorial jurisdiction over its members is extremely limited, if not non-existent.[12] *Cf. Ex parte Morgan*, 20 Fed. 298 (W.D. Ark. 1883); *see generally Pablo v. People*, 46 Pac. 636 (Colo. 1881). Indeed, a leading authority on Indian law has averred that the ". . . jurisdiction of [an] Indian tribe ceases at the border of the reservation. . . ." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 148 n. 236 (1942 ed.) (relying on 18 OP. ATT'Y. GEN. 440 (1886)). Thus, a determination that the 1904, 1907, and 1910 Acts terminated the reservation status of Gregory, Tripp, and Mellette Counties undeniably would weaken profoundly the relationship between the Rosebud Sioux Tribe and its members residing in those areas.[13]

[12]In Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974), the court did determine that the Yakima Nation possessed jurisdiction over the off-reservation hunting and fishing activities of its members. The holding appears to be based, however, on the fact that tribal members engaging in such activities are exercising explicitly conferred *tribal* treaty rights.

[13]The often tenuous nature of the relationship between an Indian tribe and its non-resident members is illustrated by provisions in the constitutions of *amici curiae* Oglala Sioux Tribe and Cheyenne River Sioux Tribe. Under both governing documents, only tribal members who reside on the reservation may participate in tribal elections. *See* CONSTITUTION AND BY LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION ART. VII; CONSTITUTION AND BY LAWS OF THE CHEYENNE RIVER SIOUX TRIBE ART. V.

B. A determination that the 1904, 1907, and 1910 Acts disestablished parts of the Rosebud Reservation would have a detrimental effect on the Rosebud Sioux Tribe's economy by depriving the Tribe and many of its members of substantial federal benefits which are contingent on Gregory, Tripp, and Mellette Counties' being considered a part of the Reservation.

The effects of a determination that the 1904, 1907, and 1910 surplus lands legislation terminated the reservation status of Gregory, Tripp, and Mellette Counties would be limited by no means to a disruption of the culture of the Rosebud Sioux Tribe. Such a decision also would pose a serious threat to the economy of the Rosebud Sioux Tribe by depriving the Tribe and many of its members of substantial federal benefits which are contingent on the reservation status of lands affected by the 1904, 1907, and 1910 Acts. Specifically, the title to lands restored to the Rosebud Reservation under the Indian Reorganization Act would be in jeopardy, and, furthermore, the distribution of substantial amounts of federal funds which are restricted to Indian reservation areas would cease.

1. The title to lands restored to the Rosebud Reservation under section 3 of the Indian Reorganization Act would be in serious question.

Section 3 of the Indian Reorganization Act contains the following:

> . . . The Secretary of the Interior if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States. . . .

Act of June 18, 1934, ch. 576, §3, 48 Stat. 984; 25 U.S.C.A. §463 (1963). Pursuant to the foregoing provisions, the Secretary of the Interior, by an Order of Restoration promulgated on January 12, 1938, restored to the Rosebud Reservation all undisposed of surplus lands in the areas opened to settlement by the 1904, 1907, and 1910 Acts.[14] *See* FEDERAL REGISTER, February 12, 1938, at 343-44 (F.R. Doc. 38-466).

Under the construction of section 3 which had been adopted by the Secretary of the Interior at the time surplus lands were restored to the Rosebud Reservation, the Order of Restoration could not possibly have been valid if Gregory, Tripp, and Mellette Counties were removed from the Reservation by the 1904, 1907, and 1910 Acts. Specifically, in a formal opinion published in 1934, the Solicitor of the Department of the Interior held as follows:

> During the early years of our dealing with the Indians, the custom was to have individual or combined nations, tribes, or bands relinquish or cede to the United States large areas claimed by them for which there was usually a cash or other

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[14]Pursuant to section 3 of the Indian Reorganization Act, lands also have been restored to the reservations of *amici curiae* Oglala Sioux Tribe and Cheyenne River Sioux Tribe. *See, e.g.*, 33 FED. REG. 146 (1968)(Pine Ridge Reservation); FEDERAL REGISTER, June 25, 1936, at 667 (F.R. Doc. 966) (Pine Ridge Reservation); 32 FED. REG. 14276 (1967) (Cheyenne River Reservation); 30 FED. REG. 15588 (1965) (Cheyenne River Reservation); FEDERAL REGISTER, May 24, 1957, at 3693 (F.R. Doc. 57-4213) (Cheyenne River Reservation).

consideration, and also the setting apart or reserving of certain lands within such ceded areas or from lands belonging to the United States and located elsewhere. . . . *In this way the Indians lost all identity with the ceded areas and their rights and interests therein were recognized as having been completely extinguished.*

In years following, for reasons varying on the different reservations, portions of these diminished or newly established reservations were also ceded to the United States. . . . *In this way the exterior boundaries of a reservation were further reduced. . . .*

. . . It can safely be said that it would not be to the interest of the public to restore to the Indians all undisposed public lands that at one time were in Indian ownership but afterwards became the property of the United States by outright cessions from the Indian owners. . . . . [Emphasis added.]

54 I.D. 559, 560 (1934). Thus, if the 1904, 1907, and 1910 Acts effected the cession of Gregory, Tripp, and Mellette Counties to the United States rather than their availability for non-Indian settlement with no alteration of reservation status, then, in light of the opinion of the Solicitor of the Department of the Interior, the Secretary was without authority to restore any lands in those areas to the Rosebud Reservation under the Indian Reorganization Act, and, consequently, the Rosebud Sioux Tribe's title to the property would be seriously jeopardized.[15]

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[15]In the years following the Solicitor's 1934 opinion, the Department of the Interior took a broader view of the types of Indian lands covered by section 3 of the Indian Reorganization Act. Indeed, under the Solicitor's current interpretation of the land restoration provision, even property formerly *ceded* by an Indian tribe apparently can be added to a reservation. *See generally*

[Footnote continued]

2. The Rosebud Sioux Tribe and many of its members no longer would be entitled to certain federal funds which can be distributed only to Indian reservation areas.

A determination that areas affected by the 1904, 1907, and 1910 Acts were removed from the Rosebud Reservation also would result in the loss of substantial amounts of federal funds to the Rosebud Sioux Tribe. At the present time, the Tribe and its members receive, quite literally, hundreds of thousands of dollars annually in monies which are earmarked explicitly for Indian reservation areas.

a. The Comprehensive Employment and Training Act of 1973[16]

The Comprehensive Employment and Training Act of 1973 authorizes the expenditure of federal funds for the purpose of facilitating training and employment opportunities for economically disadvantaged persons. *See generally* 29 U.S.C.A. §§801-992 (1975). Under title II of the Act, eligible "prime sponsors" may obtain monies with which to provide job training and transitional employment. 29 U.S.C.A. §§841 *et seq.* (1975). Title III

Bowman v. Udall, 243 F. Supp. 672 (D. D.C. 1965). The modern construction of section 3 has its origins, however, in a Solicitor's opinion rendered on June 15, 1938—after the Order of Restoration affecting the Rosebud Sioux Tribe—and was not articulated explicitly until the 1960's. *See* 69 I.D. 195 (1962); 67 I.D. 11 (1960); 56 I.D. 330 (1938). Thus, at the time lands were restored to the Rosebud Reservation, the interpretation given to the restoration provision by the Department of the Interior clearly would not have covered property ceded to the United States by an Indian tribe.

[16]Act of December 28, 1973, Pub. L. No. 93-203, 87 Stat. 839; 29 U.S.C.A. §§801 *et seq.* (1975).

of the legislation was included for the specific purpose of ensuring that Indians and Alaska Natives were targeted specifically for the receipt of funds. 29 U.S.C.A. §§871 *et seq.* (1975). Finally, title VI, which implements the Emergency Jobs and Unemployment Act of 1974, Pub. L. No. 93-567, 88 Stat. 1845, provides federal monies for areas which suffer especially high rates of underemployment and unemployment. 29 U.S.C.A. §§961 *et seq.*, (1975).

Pursuant to the various titles of the Act, the Rosebud Sioux Tribe has received substantial amounts of federal funds. During fiscal years 1974, 1975, and 1976, the Tribe obtained under titles II, III (summer youth program only), and VI sums amounting to almost $900,000.[17] For the same period of time, the Tribe received, pursuant to title III provisions other than the summer youth program, funds totaling approximately $1,000,000.[18]

A determination that those areas affected by the 1904, 1907, and 1910 Acts are not part of the Rosebud

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[17]All figures relating to the Comprehensive Employment and Training Act of 1973 which are used by *amici curiae* were obtained from the Division of Indian and Native American Programs of the Department of Labor.

[18]The *amici curiae* Oglala Sioux Tribe and Cheyenne River Sioux Tribe also have obtained substantial sums under the Comprehensive Employment and Training Act of 1973. During fiscal years 1974 through 1976, the Oglala Sioux Tribe received over $1,000,000 under titles II, III (summer youth program only), and VI, and approximately $1,400,000 under title III provisions other than those relating to the summer youth program. For the same period, the Cheyenne River Sioux Tribe was the recipient of over $500,000 in title II, III (summer youth program only) and VI funds, and also obtained approximately the same amount of monies under title III provisions other than those relating to the summer youth program.

Reservation ultimately would have drastic effects on the funding pattern described above. The problem is that, with the exception of monies other than those for the summer youth program under title III, funds obtained pursuant to titles II, III, and VI can be utilized only by reservation Indians. *See* 29 U.S.C.A. §844(a) (1975) (title II); 29 U.S.C.A. §962(e) (1975) (title VI); 29 C.F.R. §§96.3, 96.42 (1975) (title II); 29 C.F.R. §97.4 (1975) (summer youth program in title III); 29 C.F.R. §§99.3, 99.93 (1975) (title VI). At the present time the Department of Labor treats the Rosebud Reservation as constituting all or parts of Gregory, Tripp, Mellette, Todd, and Lyman Counties, South Dakota, for purposes of determining eligibility for monies under the aforementioned titles. If the counties of Gregory, Tripp, and Mellette are considered outside the Reservation, however, a significant portion of the almost $500,000 annually which the Tribe now receives under titles II, III, and VI will be eliminated.[19]

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[19]The Rosebud Sioux Tribe, of course, could attempt to make up its title II, III, and VI losses by applying for funds through title I of the Act, which authorizes the distribution of monies to state and local governments for job training and employment opportunities. The special Indian provisions in title II, III, and VI, however, were included in the legislation for the purpose, *inter alia*, of ensuring that Indian tribes would not be required to seek funds from state and local agencies, which historically often have been something less than responsive to applications from tribes. *See generally* H.R. CONF. REPT. NO. 93-737, 93rd Cong., 1st Sess. (1973); S. CONF. REPT. NO. 93-636, 93rd Cong., 1st Sess. (1973); H.R. REPT. NO. 93-659, 93rd Cong., 1st Sess. (1973); S. REPT. NO. 93-304, 93rd Cong., 1st Sess. (1973).

b. Public Works and Economic Development Act of 1965[20]

Pursuant to title I of the Public Works and Economic Development Act of 1965, the Economic Development Administration of the Department of Commerce administers public works direct and supplementary grants in areas of substantial and persistent unemployment. *See generally* 42 U.S.C.A. §§3121-3226 (1973). During fiscal years 1967 through 1976, the Rosebud Sioux Tribe received, under the provisions of the Act, well over $1,000,000 for public works projects benefiting all areas of the Rosebud Reservation, including those parts of the Reservation affected by the 1904, 1907, and 1910 Acts.[21]

The Public Works and Economic Development Act of 1965, however, indicates quite clearly that funds may be given only for projects located on Indian property:

> . . . The Secretary shall designate as 'redevelopment areas'—
>
> . . . .
>
> (3) those additional Federal or State Indian reservations or trust or restricted Indian-owned land areas which the Secretary, after consultation with the Secretary of the Interior or an appropriate state agency, determines manifest the greatest degree of economic distress on the basis of unemployment and income statistics and other appropriate evidence of economic underdevelopment. . . .

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[20]Act of August 26, 1965, Pub. L. No. 89-136, 79 Stat. 552; 42 U.S.C.A. §§1321 *et seq.* (1973).

[21]During the same period of time *amici curiae* Oglala Sioux Tribe and Cheyenne River Sioux Tribe received approximately $2,500,000 each.

42 U.S.C.A. §3161(a)(3) (1975). *Accord,* 13 C.F.R. §§302.4, 305.5, 305.22(b) (1976). Thus, the holding that Gregory, Tripp, and Mellette Counties are not located within the exterior boundaries of the Rosebud Reservation would pose an obvious threat to the continued funding of needed public works projects benefiting the Rosebud Sioux Tribe in those areas.

c. The Act of April 11, 1970[22]

Pursuant to the provisions of the Act of April 11, 1970, the Secretary of Agriculture is authorized to make loans to Indian tribes to facilitate their acquisition of additional lands within reservation boundaries. Specifically, the 1970 Act provides the following:

> The Secretary of Agriculture is authorized to make loans from the Farmers Home Administration Direct Loan Account . . . and to make and insure loans . . . to any Indian tribe recognized by the Secretary of the Interior or tribal corporation established pursuant to the Indian Reorganization Act . . . which does not have adequate uncommitted funds, to acquire lands or interests therein *within the tribe's reservation as determined by the Secretary of the Interior,* or within a community in Alaska incorporated by the Secretary pursuant to the Indian Reorganization Act, for use of the tribe or the corporation or the members of either. [Emphasis added.]

25 U.S.C.A. §488 (1976 Supp.). No doubt possibly can exist that funds distributed under the foregoing statute can be utilized by an Indian tribe solely for the purpose

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[22]Act of April 11, 1970, Pub. L. No. 91-229, 84 Stat. 120; 25 U.S.C.A. §488 (1976 Supp.).

of purchasing additional lands within its "reservation.".[23]

Furthermore, the question whether the disestablishment of Gregory, Tripp, and Mellette Counties would affect the Rosebud Sioux Tribe's entitlement to funds under the 1970 Act has passed beyond the academic stage. In November, 1975 the Department of Agriculture informed the Tribe that, as a result of the Eighth Circuit's decision in the *Rosebud Sioux Tribe* case, funds distributed under 25 U.S.C.A. §488 no longer could be used by the Tribe to purchase property outside Todd County, South Dakota.

d. The Housing Act of 1949[24] and the Housing and Urban Development Act of 1968[25]

Pursuant to the provisions of the Housing Act of 1949 and the Housing and Urban Development Act of 1968, the Secretary of Housing and Urban Development is authorized to provide funds to "local public agencies" to be used for the construction of housing. *See generally* 42 U.S.C.A. §§1452, 1453 (1969). Section 1460(h) of title 42 of the United States Code defines the term "local public agency" in the following manner:

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[23]During fiscal year 1974 *amicus curiae* Cheyenne River Sioux Tribe received funds in the amount of approximately $1,000,000 for the acquisition of additional lands, and in fiscal year 1975 *amicus curiae* Oglala Sioux Tribe applied for, and recently has finalized, a loan of $3,000,000. The Rosebud Sioux Tribe also filed an application for funds totaling $1,000,000 in fiscal year 1975.

[24]Act of July 15, 1949, ch. 388, 63 Stat. 413, *as amended*, 42 U.S.C.A. §§1441 *et seq.* (1969).

[25]Act of August 1, 1968, Pub. L. No. 90-448, 82 Stat. 602; 42 U.S.C.A. §§1441a *et seq.* (1963).

> . . . 'Local public agency' means any State, county, municipality, or other governmental entity or public body, or two or more such entities or bodies, authorized to undertake the project for which assistance is sought. The 'State' includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, and Trust Territory of the Pacific Islands, the territories and possessions of the United States, and *Indian tribes, bands, groups, and nations, including Alaska Indians, Aleuts, and Eskimos, of the United States.* [Emphasis added.]

42 U.S.C.A. §1460(h) (1976 Supp.). As a practical matter, the Department of Housing and Urban Development heretofore has implemented the foregoing statutory provision by making grants to an Indian tribe only for projects located on lands over which the tribe exercises jurisdiction.

If a determination is made that the 1904, 1907, and 1910 Acts disestablished the Gregory, Tripp, and Mellette County portions of the Rosebud Reservation, then the Rosebud Sioux Tribe, in all likelihood, will be unable, in the future, to obtain federal housing funds for the benefit of any tribal members who reside in an area affected by surplus lands legislation. The obvious reason for this conclusion is that if property opened to settlement by surplus lands legislation is not a part of the Reservation, it is highly doubtful that the Tribe functions as a "local public agency", within the meaning of the federal housing laws, in the areas affected by the 1904, 1907, and 1910 Acts.

e. Crime Control Act of 1973[26]

Pursuant to the provisions of the Crime Control Act of 1973, the Law Enforcement Assistance Administration of the Department of Justice has the authority to distribute funds for planning grants, and for law enforcement and criminal justice purposes, to "units of general local government". *See generally* 42 U.S.C.A. §§3731, 3750 (1973). Under 42 U.S.C.A. §3781 the term "unit of general local government" is defined in the following manner:

> . . . 'Unit of general local government' means any city, county, township, town, borough, parish, village, or other general purpose political subdivision of a State, *an Indian tribe which performs law enforcement functions as determined by the Secretary of the Interior* . . . . [Emphasis added.]

42 U.S.C.A. §3781(d) (1973). In implementing provisions of the Crime Control Act of 1973, the Law Enforcement Assistance Administration has awarded grants to Indian tribes only for projects located in areas over which the tribes exercise criminal jurisdiction.[27]

If Gregory, Tripp, and Mellette Counties are treated as no longer being within the boundaries of the Rosebud Reservation, the Rosebud Sioux Tribe might well be prohibited from utilizing funds under the 1973 Act for projects in the opened portion of the Reservation. As *amici curiae* have emphasized above,[28] a determination

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[26]Act of August 6, 1973, Pub. L. No. 93-83, 87 Stat. 197; 42 U.S.C.A. §§3711 *et seq.* (1973).

[27]During fiscal year 1976 the Rosebud Sioux Tribe received almost $70,000 in funds from the Law Enforcement Assistance Administration. For the same period *amici curiae* Oglala Sioux Tribe and Cheyenne River Sioux Tribe were awarded monies which totaled, respectively, $435,000 and $25,000.

[28]*See* text *supra*, at 23-27.

that the 1904, 1907, and 1910 Acts effected disestablishment may mean that the Tribe no longer exercises criminal jurisdiction in Gregory, Tripp, and Mellette Counties, or, at the very least, that such jurisdiction has been limited drastically.

The foregoing discussion demonstrates that a decision holding the Gregory, Tripp, and Mellette County portions of the Rosebud Reservation were terminated by the 1904, 1907, and 1910 Acts would have significant consequences for the Rosebud Sioux. First, such a determination would have a debilitating impact on Rosebud Sioux culture by facilitating the extension of state jurisdiction and a concomitant reduction of federal and tribal authority. Second, the disestablishment of three-quarters of the Reservation would have profound economic implications by effecting a substantial diminution in the flow of federal funds to the Tribe.

CONCLUSION

The subsequent administrative and legislative treatment of the areas of the Rosebud Reservation opened to settlement by the 1904, 1907, and 1910 Acts confirms the conclusion that the legislation did not disestablish reservation lands located in Gregory, Tripp, and Mellette Counties, South Dakota. Furthermore, a determination that the aforementioned surplus lands acts did effect disestablishment would have undeniably, and, perhaps irreparably, deleterious effects on the social and economic life of the Rosebud Sioux Tribe and its members.

For the foregoing reasons, *amici curiae* respectfully submit that the judgment of the United States Court of Appeals be reversed.

Respectfully submitted,

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